IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

NATIONAL LABOR RELATIONS BOARD,	)	
Applicant,	)	
v.	)	Case No.: 16-CV-622-GKF-PJC
INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 627,	)	
Respondent.	)	

RESPONDENT'S RESPONSE TO THE APPLICATION OF APPLICANT

COMES NOW Respondent in response to the application of applicant [Dkt. No. 1] and would show the court as follows:

1. It is unclear what the record on enforcement is. The National Labor Relations Board says it is an administrative agency of the United States government, but does not certify a record[1] for consideration by this court. Lacking an appropriately certified record or other evidence admitted, this court is at a loss to act. FRE 101(a); FRE 902; Compare *In the Matter of the*

[1]Respondent does note that the government, not really constrained by Truth, has submitted some partial and contextually inaccurate information in its application. This is another reason why a record should be certified and evidence taken before any decision is made herein. For example, Dkt. 1-2, Ex: E refers to the very documents Applicant seeks herein as being enclosed therein, but Applicant now pretends it does not have them (by not attaching them, and asking for them again). It admits receiving them. Dkt. 1-2, pp. 40f of 84.

Guardianship of Holly, 2007 OK 53, 164 P3d 137, and *Willis v. Sequoyah House, Inc.,* 2008 OK 87, 194 P3d 1285.

2. When the NLRB (illegally) issued its decision in April, 2013, there were four basic requirements. One was to allow Loerwald to review the out-of-work list. In the meantime, the Union had changed its procedures and had begun posting the out-of-work list for each of its two offices at a point in the respective office accessible to all members/interested persons. Dkt. 1-2, p. 35 of 84. The second was that the Union was to have posted the standard form notice, modified to the circumstances of the case, at the two Union halls. The Union did that thereupon. Dkt. 1-2, pp. 33f of 84. The third requirement was to put Loerwald back onto the out-of-work list. However, that had already been done in negotiations between her lawyer and the Union's counsel at the depositions in August, 2012, as was certified to Applicant. Dkt. 1-2, p. 35 of 84. The fourth thing was to pay Loerwald her back pay. However, the government did not say how much.

3. As a result, competing filings, an application for enforcement (by the NLRB) and petition for review (by the Union), were made in the Tenth Circuit. The case was moving along swimmingly in the Tenth Circuit until the U.S. Supreme Court decided that the NLRB was inappropriately constituted (the vacation appointment powers case) and the matter was remanded to the NLRB. Ultimately, the NLRB ruled again, basically along

the same lines, and, again, there were cross filings in the Tenth Circuit. The Tenth Circuit affirmed the NLRB.

4. However, neither the NLRB nor the Tenth Circuit ever said how much money was due. The other matters, of course, had all long since been complied with by the Union. This is apparently the common M.O. of the government working with the government.[2]

5. By the time the Tenth Circuit decision in this case was handed down, the only outstanding substantive issue had to do with the monies to be paid to Loerwald. The federal government demanded that she be paid. Accordingly, how much she was due was calculated and a check was written to her and sent to the government. Dkt. 1-2, pp. 32ff of 84 (and portions thereof Applicant did not include; but see 1-2, pp. 40f of 84). The federal government refused to accept the money and sent it back. Dkt. 1-2, p. 42 of 84.

6. In this proceeding the federal government continues to simultaneously take the position that 1) the Union must pay Loerwald and 2) the Union will

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[2]The Tenth Circuit considers the matter before there is any finality as commonly required under F.R.Civ.P. 54(b). See, for example, *Teamsters, Local 523 v. NLRB*, 590 F3d 849, vacated at 562 U.S. 801 (2010) (because, again, the NLRB was improperly constituted, but in a different defect), 624 F3d 1321 (10th Cir. 2010) (remanding from the Supreme Court to the NLRB), 488 Fed. Appx. 280 (10th Cir. 2012) (reaffirming the position that the Tenth Circuit had held in its prior decision), cert denied 133 S.Ct. 1458 (2013), 360 NLRB No. 23 (2014) (supplemental decision fixing amount due), and case numbers 14-9511 and 14-9519, cross filings over that order (10th Cir. 2014).

not be allowed to pay Loerwald. Joseph Heller is not just fiction.

7. NLRB apparently issued a subpoena, apparently not served, that sought the kitchen sink and then some; or, maybe, just sought the documents already produced. It also sought creation of documents that did not exist. This is the federal service approach, rather than to attempt to understand the situation and act accordingly. Respondent objects to the subpoena.

8. For the first, the federal government claims that Respondent is in Tulsa, Oklahoma, while noting that a second office (the one out of which Loerwald was primarily hired in) is in Oklahoma City. These are two different judicial districts. And these are not judicial districts anywhere near Washington, D.C., where the subpoena requests compliance. F.R.Civ.P. 45(c) provides for compliance in Oklahoma, not Washington, D.C.[3] The subpoena should not be enforced except within the confines of Rule 45(c). See cases in ¶ 16 below.

9. 29 U.S.C. § 161(4) sets the means for service of process, including U.S. Mail, telegraph, or leaving a copy. However, none of these forms appears to have been used by Applicant. See Docket No. 1-2, pages 62 and 63.

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[3]It is strange that the federal government, apparently without a thought, wants all the records, computers, etc., of the Union to be put on a semi truck and shipped to Washington, D.C., so that its compliance officer in Little Rock can look it over. And, it wants compliance at 5:00 p.m., as though the government will be prepared at 5:00 p.m. to bring boxes upon boxes of information into its facility, presumably to spend all night doing its inspection and copying?

CF&I Steel v. Mitsui & Co. (USA), Inc., 713 F2d 494 (9th Cir. 1983) (failure to follow procedures is defective service); *Sally v. Board of Governors, UNC,* 136 FRD 417 (N.D. M.C. 1991) (where service by fax is not one of the listed methods, it is no service); and *Audio Enterprises v. B&W Loud Speakers,* 957 F2d 406 (7th Cir. 1992) (delivery by private sector commercial carrier is not service by mail).

10. Further, Respondent objects to the two pages of Mother-Hubbard instructions and definitions. Rather, a request for documents is to be specific. *Goodell v. Rehrig International, Inc.,* 683 F.Supp. 1051, 1053 (E.D. Va. 1988); *Ragge v. MCA/Universal Studies, Inc.,* 165 FRD 601, 605 (C.D. Cal. 1995); *Mercantile Metal & Bore Corp. v. American General Supply Corp.,* 12 FRD 345, 346 (S.D. N.Y. 1952); *Regan v. Touhy v. Wal-Green Company,* 526 F3d 641 (10th Cir. 2008). This objection also applies to the documents requested, particularly under number 2, and the interrogatories.

11. IUOE, Local 627, also objects to the subpoena duces tecum in that it requests documents and information that are covered by the attorney-client, work product, or other privilege. *Hickman v. Taylor,* 329 U.S. 495 (1947); *Uinta Oil Refining Co. v. Continental Oil Co.,* 226 F.Supp. 495 (D. Ut. 1964); FRE 502. Even the federal government admits this–it complained that the attorney would not turn over his own notes.

12. 29 U.S.C. § 161(1), as referenced in the interrogatories, provides for testimony; it does not provide for interrogatories. Witnesses may only be examined orally under oath and upon application. 29 C.F.R. § 102.30. Since the interrogatories do not seek attendance and testimony or production of documents, or seek the creation of documents not in existence, they are outside the outside the authority of the Board. Baicker-McKee, et al., *Federal Civil Rules Handbook* (Thomson Reuters 2016), p. 926.

13. Further, attendance of witnesses and production of evidence may only be made with regard to a "designated place of hearing." 29 C.F.R. § 102.31. However, in this case, there is no designated place of hearing[4] or an ALJ appointed, or any hearing scheduled. The general rule is that documents must be produced within 100 miles of where they are kept. F.R.Civ.P. 45(c)(2). And a person may be subpoenaed only so far. F.R.Civ.P. 45(c). The request of the subpoena duces tecum herein is beyond that distance.

14. This party further objects to the subpoena duces tecum in that it seeks documents and information (or copies thereof) already in the possession

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[4]See the Teamsters line of cases above. An ALJ was appointed on liability issues. That decision went to the NLRB, then the Tenth Circuit, then the Supreme Court, then the Tenth Circuit, then the NLRB, then the Tenth Circuit, then the Supreme Court, and was there final. Then another ALJ was appointed on the amount issues. That went from the ALJ, then to the NLRB, then to the Tenth Circuit, where it was mercifully settled and put out of its misery.

of the NLRB and that the move is simply an oppressive and harassing tactic of the General Counsel. This is a major objection herein. For example, the government asked for documents to calculate damages. However, the Union has already given those to the government. Is it just harassing the Union? Is it not intelligent enough to know what it wants? Is there something that it wants other than what it has? If so, what is that? The lack of specificity in the information sought is such as to render the requests meaningless. In addition, the records, OWLs, etc., are information that the government[5] has–they offered much of that into evidence at the original hearing. Again, do we have new people involved that have no history in the case and do not have a clue of what has gone on before? Is it just harassment? It is more Joseph Heller? For example, the posted, signed copies of the notice to employees are now in the possession of the NLRB: the NLRB forwarded to the Union what it wanted signed and posted; the Union signed and posted them; the Union then returned them to the NLRB. Further, the NLRB took the hiring-hall referral records for the period in question in preparation for the ALJ hearing and also received all relevant copies in subsequent developments. With regard to the interrogatories, the Union has explained to the NLRB on multiple occasions the underlying

[5]Nor does Applicant seek the information necessary to make a calculation (although some has orally been given to it). The requests are, thus, over- and under-inclusive, or, in other words, the Applicant has not taken the time to have a clue on the topic.

calculations used to reach the amount of the back pay check of $16,879.58, which was returned, including what was included, the rationale, and so forth. Why is it asking again? Similarly, with the other information requested. See F.R.Civ.P. 26(c), allowing relief to protect from annoyance, oppression, or undue burden or expense.

15. Finally, the government complains that the income tax implications of any payment herein should be taken into account. The Union did do so: during the applicable year, Loerwald did not work. The amount paid is less than the exemptions, standard deductions, etc., applicable. Thus, there are no income tax implications.

16. Enforcement of the subpoena is under F.R.Civ.P. 45. *NLRB v. Midwest Heating & Air Conditioning,* 528 F.Supp.2d 1172 (D. Kan. 2007). As *Midwest Heating* notes, there is no provision for an award of attorneys' fees under Rule 45. Further, since the labor laws do not explicitly provide for attorneys' fees in seeking subpoena enforcement, no award is appropriate. *NLRB v. Cable Car Advertisers,* 319 F.Supp.2d 991 (N.D. Cal. 2004). See also *Bailey Industries v. CLJP, Inc.,* 270 FRD 662 (N.D. Fla. 2010); *NLRB v. Durham School Services,* 2015 WL 150898 (N.D. Fla. 2015) (noting that the enforcement action follows F.R.Civ.P. 45, not F.R.Civ.P. 37).

WHEREFORE, premises considered, Respondent prays the subpoena not be enforced or, alternatively, be limited to specified relevant documents which

have not already been exchanged.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on 19 October 2016, a true, correct, and exact copy of the foregoing document was served *via* electronic notice by the CM/ECF filing system to all parties on their list of parties to be served in effect this date.

By: ***s/Steven R. Hickman***
Steven R. Hickman